

NPRM focuses on the quality of the captions that VPOs send, and on the quality of the captions that VPDs render or pass through, and is designed to address the concern raised by commenters that VPDs and VPOs may be held responsible for variations in quality caused by outside factors. It also mitigates the concerns raised by certain commenters that quality requirements could be subjective and time-consuming¹⁶⁹ because the quality standard is based on the objective quality characteristics of the actual closed captions used for the televised version of the programming, which are readily apparent. We reject commenters' argument that regulation of caption quality would raise First Amendment concerns.¹⁷⁰ As explained above, the quality standards we adopt here are based upon the quality of the television captions provided for that programming. Thus, our quality standards impose no greater burden than our television closed captioning requirements, which the D.C. Circuit has already suggested are constitutional.¹⁷¹ We do not expect that this quality requirement will create disincentives to making video programming available online,¹⁷² since it merely requires VPOs to provide captions comparable to those available for television distribution. Although some commenters suggest that a decision to impose quality standards here would be inconsistent with the lack of television closed captioning quality standards,¹⁷³ in fact, the Commission has a proceeding pending on the caption quality of television programming.¹⁷⁴ Further, the IP closed captioning regime differs from the television closed captioning regime since the television closed captioning rules require that captions be created in the first instance, whereas in the IP context, captions are only required for IP-delivered video programming that has already been published or exhibited on television with captions. We believe that quality standards are appropriate in the IP context to prevent VPOs or VPDs from degrading the quality of the captions that actually appeared on television when the same programming is distributed with captions via IP. The record provides no basis for concluding that it is unreasonable to expect VPOs and VPDs to at least maintain the same quality with respect to programming distributed via IP, since we will not hold VPOs and VPDs responsible for quality effects that result from outside factors. To the extent any VPO or VPD believes that the quality requirement is economically burdensome, it may file an exemption petition.

38. We are not persuaded that any of the alternate approaches to caption quality proposed by commenters would be preferable to the approach adopted herein. Specifically, CEA proposes the adoption of "specific minimum technical requirements . . . if achievable," which proposal focuses improperly on the "achievability" language of Section 203 of the CVAA rather than on regulations specific to VPOs and VPDs pursuant to Section 202 of the CVAA.¹⁷⁵ Other commenters also propose a "functional equivalence" quality standard, which Microsoft describes as having a focus on "[e]ssential equality in function rather than exact equality with respect to all the features and capabilities."¹⁷⁶ We find

¹⁶⁹ See, e.g., MPAA Comments at 13; NAB Comments at 15-16; CBS Reply at 17.

¹⁷⁰ See, e.g., MPAA Comments at 13; Time Warner Reply at 4-5.

¹⁷¹ See *supra* ¶ 25 (discussing First Amendment implications of IP closed captioning obligations).

¹⁷² See, e.g., NAB Comments at 14; CBS Reply at 17-18.

¹⁷³ See, e.g., CBS Reply at 17.

¹⁷⁴ See *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Petition for Rulemaking*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005) (issued in response to a Petition for Rulemaking filed by the TDI Coalition on July 23, 2004). See also *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, Public Notice, 25 FCC Rcd 15056 (CGB, 2010).

¹⁷⁵ CEA Comments at 5.

¹⁷⁶ See, e.g., CEA Comments at 4-5; DiMA Comments at 10-11; Microsoft Comments at 14-15; APTS/PBS Reply at 9-10; Letter from Julie M. Kearney, Vice President, Regulatory Affairs, Consumer Electronics Association, to Marlene H. Dortch, Secretary, FCC, Attachment at 3 (Nov. 4, 2011) ("CEA Nov. 4 *Ex Parte* Letter").

that such an approach is amorphous and does not offer any benefits not provided by the quality standard adopted herein.

39. We encourage VPDs to improve caption quality to enhance accessibility, if doing so is not constrained or prohibited by copyright law or private agreement.¹⁷⁷ AT&T expresses concern that “[e]ncouraging VPPs/VPDs to edit captions could create inconsistencies in the quality of programming from one medium to another,” which is not an issue when the VPO handles edits for all media simultaneously.¹⁷⁸ In the *NPRM*, the Commission explained that it did not intend to *require* VPDs to improve caption quality, but rather, to allow them to do so if they had any necessary permission.¹⁷⁹ Some commenters express the view that copyright concerns should not prevent a VPD from improving caption quality.¹⁸⁰ Some commenters argue that improving caption quality for an IP-delivered video program would be a non-infringing fair use of the video under copyright law.¹⁸¹ In contrast, other commenters assert that copyright law generally would prevent a VPD from improving caption quality.¹⁸² We see no need to determine in this proceeding whether a VPD may, consistent with copyright law, improve caption quality without the consent of a VPO. We expect that VPOs and VPDs will typically agree through their contractual negotiations about the appropriate extent, if any, of VPD improvement to a VPO’s caption file.¹⁸³

4. Video Programming Subject to Section 202(b)

40. In the paragraphs below, we define the types of programming that are subject to the IP closed captioning rules. We generally adopt the definitions proposed in the *NPRM* but modify some of them, as discussed below. As proposed in the *NPRM*, we also limit our rules to programming aired with captions on television in the United States.

41. *Video programming.* We adopt the *NPRM*’s proposal to codify the CVAA’s definition of

¹⁷⁷ See Consumer Groups Comments at 11-12; see also NAB Comments at 17.

¹⁷⁸ See AT&T Comments at 9.

¹⁷⁹ See *NPRM*, 26 FCC Rcd at 13745, ¶ 19.

¹⁸⁰ See, e.g., Consumer Groups Comments at 12-16; NCRA Comments at 2-3; Reply Comments of Public Knowledge at 1-10 (“PK Reply”); Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Sept. 26, 2011) (“Consumer Groups Sept. 26 *Ex Parte* Letter”); Consumer Groups Nov. 10 *Ex Parte* Letter at 2.

¹⁸¹ See, e.g., Consumer Groups Comments at 12-15; PK Reply at 2-9; see also 17 U.S.C. § 107.

¹⁸² See, e.g., AT&T Comments at 8-9; Microsoft Comments at 5 n. 8 (“The Copyright Act grants broad, exclusive rights to owners of copyrights in audiovisual works. A VPP likely would be found to infringe upon many of those exclusive rights, including infringement of reproduction rights, adaptation rights, distribution rights, and public performance rights, if it acted without permission to insert closed captioning for a copyrighted video programming. . . . The addition of captioning also is likely to require the VPP to decrypt the digital rights management protections that accompany many video files, leading to a separate violation of the Digital Millennium Copyright Act.”); NAB Comments at 17; Starz Comments at 3-4; AT&T Reply at 5; NAB Reply at 19; TWC Reply at 13.

¹⁸³ In the *NPRM*, the Commission contemplated that a requirement for captions of IP-delivered video programming to be of at least the same quality as captions of television programming would require IP-delivered captions to include the same user tools, such as the ability to change caption font and size. See *NPRM*, 26 FCC Rcd at 13744, ¶ 18. We believe that the issue of user tools is better suited to our discussion of requirements for devices subject to Section 203 of the CVAA than the present discussion of requirements for VPOs and VPDs pursuant to Section 202(b) of the CVAA. See also AT&T Comments at 10 (“[M]any of the quality considerations raised by the Commission, such as the placement, color, opacity, size, and font of captions, are properly considered aspects of the Internet-connected playback apparatus and outside the scope of the requirement for VPPs/VPDs to pass through or render closed captions.”). Accordingly, user tool requirements are discussed in Section IV.C, below.

“video programming” in our rules. Section 202(a) of the CVAA defines “video programming” as “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).”¹⁸⁴ The Senate and House Committee Reports did not elaborate on the term “video programming,” and commenters generally did not further explore the meaning of the term. We agree with the suggestion by Consumer Groups that programming “that was published or exhibited on television” by definition constitutes “video programming,”¹⁸⁵ since anything that was published or exhibited on television must be provided by, or be comparable to programming provided by, a television broadcast station.¹⁸⁶

42. *Consumer-generated media.* We also adopt the *NPRM*’s proposal to codify the CVAA’s definition of “consumer-generated media” in our rules. Section 3 of the Act, as revised by the CVAA, defines “consumer-generated media” as “content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.”¹⁸⁷ The Senate and House Committee Reports did not elaborate on the definition, but certain commenters made proposals concerning the proper scope of “consumer-generated media” with regard to the new IP closed captioning requirements. We agree with Consumer Groups that, when consumer-generated content is shown on television as part of a captioned full-length program which a VPD then distributes over the Internet, the Internet version of the captioned full-length program must include captions.¹⁸⁸ We conclude that in such a circumstance, the captioned full-length program does not constitute “consumer-generated media” merely because it includes certain content that was originally consumer-generated; rather, pursuant to the CVAA, captioning is required when the full-length program is delivered via IP because it is “video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.”¹⁸⁹ For example, if a consumer creates a video and makes it available on YouTube, and that video is then shown with captions as part of a news broadcast on television, then that full-length news broadcast (which includes the consumer-generated video) must include captions when a VPD distributes it via IP. We also agree with commenters who propose that “consumer-generated media” for these purposes should include content that is made available online by individual consumers without the consent of a VPO that has rights in the content,¹⁹⁰ since in such situations VPOs do not maintain control over the programming and caption file, and VPDs do not maintain control over the distribution of the programming directly to the end user. Thus, it is not

¹⁸⁴ 47 U.S.C. § 613(h)(2). This definition of “video programming” is almost identical to the definition set forth in Section 602(20) of the Act. See 47 U.S.C. § 522(20) (defining “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station”).

¹⁸⁵ See Consumer Groups Comments at 17.

¹⁸⁶ The Act and our rules establish that programming aired by MVPDs is “video programming.” See, e.g., 47 U.S.C. § 522(13) (an MVPD “makes available for purchase . . . multiple channels of video programming”); 47 C.F.R. § 76.5(a) (cable television system is “designed to provide cable service which includes video programming”); *id.* § 76.1000(e) (defining MVPD as an entity that makes available for purchase multiple channels of video programming).

¹⁸⁷ 47 U.S.C. § 153(14).

¹⁸⁸ See Consumer Groups Comments at 17-18; Consumer Groups Sept. 26 *Ex Parte* Letter at 2.

¹⁸⁹ 47 U.S.C. § 613(c)(2)(A).

¹⁹⁰ See EWTN Comments at 3; NAB Comments at 13-14; CBS Reply at 16; NAB Reply at 15; NCTA Reply at 6 n. 19; see also *NPRM*, 26 FCC Rcd at 13745, ¶ 20. We also agree with NAB that “no party in a legitimate distribution chain should be held responsible for captioning content that has been pirated and is not authorized for online distribution.” See NAB Comments at 14 n. 32; see also MPAA Reply at 13. NAB expresses its view that, “[i]n such cases, the absence of captions on full-length programming distributed online without authorization may help to drive viewers to legitimate content and away from pirated material.” See NAB Comments at 14 n. 32.

reasonable to expect VPOs and VPDs to bear any obligations for captioning content made available online by individual consumers without the necessary consent.

43. Players embedded in a website present a different situation. When a VPD makes full-length video programming available to consumers to redistribute through a player embedded in a website, the player is controlled by the VPD, even though it appears as if it is playing video on the website through which the consumer redistributes it, such as a blog or a social networking website. When a VPD makes full-length video programming available to consumers to redistribute through such a player, the video programming is not consumer-generated media and the VPD must ensure that the player displays required captions pursuant to its “pass through or render” obligations discussed in paragraph 27 above.¹⁹¹

44. *Full-length programming.* The *NPRM* proposed to define “full length programming” as “video programming that is not video clips or outtakes.”¹⁹² Consistent with our proposal in the *NPRM*, that the captioning requirements of Section 202(b) apply to full-length programming, and not to video clips or outtakes, we adopt the proposed definition with a slight modification to make our rules more clear.¹⁹³ Specifically, we define “full-length video programming” as video programming that appears on television and is distributed to end users, substantially in its entirety, via IP. This definition thereby excludes video clips or outtakes of the video programming that appeared on television. We find that this decision is supported by commenters.¹⁹⁴ Through the inclusion of “substantially in its entirety,” we mean to reference video programming that is distributed via IP as a complete video programming presentation, such as an episode of a television show or a movie. At the same time, as explained below, when substantially all of a full-length program is available via IP, we will not consider that program to be a “clip,” but rather, a “full-length program” subject to the IP closed captioning requirements.

45. We define “video clips” as excerpts of full-length video programming, consistent with the proposals of some commenters.¹⁹⁵ We believe that this definition is consistent with what consumers commonly think of as “video clips.” When substantially all of a full-length program is available via IP, we will not consider that program to be a “clip,” but rather, a “full-length program” subject to the IP closed captioning requirements. For example, an entity covered by our new rules would not be permitted simply to shave off a few minutes (or brief segments) from a full-length half hour program just to avoid fulfilling its captioning obligations. Our decision that substantially all of a full-length program does not constitute a “clip” is consistent with congressional intent to increase the accessibility of video programming to individuals who are deaf or hard of hearing.¹⁹⁶ We also agree with members of the

¹⁹¹ See also Consumer Groups Comments at 4 (“Some providers also permit their videos to be embedded on other entities’ websites, such as blogs; consumers then view the videos in an embedded frame on the other entities’ websites, rather than *directly* on the providers’ websites. In those situations, the party responsible for captioning should be the originating provider of the video, not the operator of the embedding website . . .”) (footnote omitted).

¹⁹² *NPRM*, 26 FCC Rcd at 13768, § 79.4(a)(2) (App. - Proposed Rule Changes).

¹⁹³ See *NPRM*, 26 FCC Rcd at 13745, ¶ 21. See also 47 U.S.C. § 613(h)(2) (“‘video programming’ means programming by, or generally considered comparable to programming provided by a television broadcast station”).

¹⁹⁴ See MPAA Comments at 10; NAB Comments at 12; NCTA Comments at 20; CBS Reply at 15; NAB Reply at 12; Reply Comments of the Named State Broadcast Associations at 5 (“State Associations Reply”). We note that, while Microsoft has indicated that technical obstacles exist with respect to posting video clips online with captions, others have disagreed. See Letter from Gerald J. Waldron, Counsel to Microsoft Corp., to Marlene Dortch, Secretary, FCC, at 3-4 (Nov. 22, 2011); Letter from Dr. Christian Vogler, Ph.D., Director, Technology Access Program, Gallaudet University, and Andrew S. Phillips, Law & Advocacy Center, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Dec. 9, 2011).

¹⁹⁵ See NCTA Comments at 20; CBS Reply at 15; NCTA Reply at 4.

¹⁹⁶ See Senate Committee Report at 1; House Committee Report at 19.

industry and consumer groups that a full-length program posted online in multiple segments, to enable consumers to more readily access a particular segment of the program, constitutes full-length programming and will have to be captioned under our new rules.¹⁹⁷ Thus, for example, a VPD that divides a program into various segments for easy viewing and posts the segments on the Internet would still have to ensure the pass through or rendering of the captions for each of these segments. Individuals should not be denied access to captioned IP-delivered programming because it is available online only in segmented format.

46. We note that in the *NPRM*, the Commission had proposed to define “video clips” as “small” sections of a larger video programming presentation, consistent with the *Comcast-NBCU Order*.¹⁹⁸ We now reject that approach. The word “small” in the proposed definition of “video clips” could inadvertently create a class of programming that is neither a “video clip” nor a “full-length program,” because a particular clip may not be “small” but also may not be a full-length video program. We believe that the definition of “video clips” adopted herein addresses that concern because it eliminates any need to evaluate whether a particular video clip constitutes a *small* section of a larger video programming presentation. Further, we encourage VPOs and VPDs to provide closed captions for IP-delivered video clips where they are able to do so. We emphasize that, “if there is clear evidence that an entity has developed a pattern of attempting to use video clips to evade its captioning obligations,” we may find a violation of our rules.¹⁹⁹

47. We reject proposals that the Commission limit the definition of “video clips” to promotional materials that do not exceed a certain duration or fraction of the program.²⁰⁰ There is no evidence in the CVAA or its legislative history that Congress intended to exclude “video clips” only if they are promotional in nature, and we do not see any evidence that Congress sought to exclude only clips of a certain duration or percentage of the full-length program.²⁰¹

48. Finally, we emphasize that the legislative history states that Congress “intends, *at this time*, for the regulations to apply to full-length programming and not to video clips or outtakes.”²⁰² We

¹⁹⁷ See Consumer Groups Comments at 20; NAB Comments at 12; NCTA Comments at 20; CBS Reply at 15; NAB Reply at 13.

¹⁹⁸ See *NPRM*, 26 FCC Rcd at 13746, ¶ 21; see also *Comcast-NBCU Order*, 26 FCC Rcd at 4358 (App. A: Conditions) (explaining that “short programming segments” are “also known as clips”). Some commenters support the proposed definition of video clips. See, e.g., Microsoft Comments at 4; Starz Comments at 9 n. 10.

¹⁹⁹ See APTS/PBS Reply at 7.

²⁰⁰ See Consumer Groups Comments at 18 (“[W]e recommend that the definition of ‘video clips’ be limited to videos no longer than thirty seconds in duration that contain only promotional materials and advertisements for other programming.”); DIRECTV Comments at 9 (“[V]ideo clips should be defined to include promotional materials composed of one or more sections of a larger work, but should not exceed one quarter of the overall length of the video program.”); Consumer Groups Reply at 8 (“We further urge the Commission to reject other proposals, such as DIRECTV’s percentage-based definition, that would permit the posting of lengthy caption-less excerpts from video programming without any sound rationale for omitting the captions.”) (footnote omitted); Consumer Groups Nov. 10 *Ex Parte* Letter at 2. Other commenters found the proposals of Consumer Groups and DIRECTV objectionable because such a definition would be impractical to apply and inconsistent with Congress’s intent as shown by the CVAA and its legislative history. See NAB Comments at 12; CBS Reply at 15; NAB Reply at 11-12; NCTA Reply at 4-5.

²⁰¹ We also reject the proposal of Consumer Groups that “video clips” must be no longer than 30 seconds in duration, and the proposal of DIRECTV that video clips must not exceed one quarter of the program’s overall length, as Consumer Groups and DIRECTV fail to justify the strained readings of the terms “video clips” and “full-length programming” on which their proposals rely. See *supra* n. 200.

²⁰² See Senate Committee Report at 13-14 (emphasis added); House Committee Report at 30 (emphasis added).

believe that this legislative language, which references the present time only, signals Congress's intent to leave open the extent to which such programming should be covered under this section at some point in the future. Accordingly, we may determine, at a later time, that congressional intent "to help ensure that individuals with disabilities are able to . . . better access video programming" may warrant applying these captioning requirements beyond full-length programming, by for example including video clips within the captioning requirements or defining the term more narrowly.²⁰³ It is particularly important that news content, which plays the vital role of ensuring an informed citizenry, be made accessible to all citizens. As Representative Markey and Senator Pryor recognize, "Americans increasingly are accessing online news, information and entertainment in . . . segments . . ." ²⁰⁴ We therefore encourage the industry to make captions available on all TV news programming that is made available online, even if it is made available through the use of video clips as defined above. If we find that consumers who are deaf or hard of hearing are not getting access to critical areas of programming, such as news, because of the way the programming is posted (e.g., through selected segments rather than full-length programs), we may reconsider this issue to ensure that our rules meet Congress's intent to bring captioning access to individuals viewing IP-delivered programming.²⁰⁵

49. We adopt the definition of "outtakes" that the Commission proposed in the *NPRM*. The Commission proposed to define "outtakes" as content that is not used in an edited version of video programming shown on television.²⁰⁶ Of the few commenters that discuss this proposed definition, all express their support.²⁰⁷ We agree with Consumer Groups that "bloopers" and other incidental material shown on television with captions do not fall within the definition of "outtakes" prescribed herein, when such content is, in fact, used in an edited version of video programming shown on television.²⁰⁸

50. *Foreign programming.* We affirm the *NPRM*'s tentative conclusion that the CVAA requires closed captioning of IP-delivered video programming that was published or exhibited on television in the United States with captions after the effective date of the regulations. The Commission stated in the *NPRM* that the best reading of the CVAA seemed to be that closed captioning is required on IP-delivered video programming that was published or exhibited on television *in this country* with captions after the effective date of the regulations.²⁰⁹ Industry commenters generally agree with the Commission that programming that has been shown on television with captions only in another country should not be subject to the new requirements for IP closed captioning.²¹⁰ Consumer Groups argue,

²⁰³ See, e.g., Letter from Rep. Edward Markey and Sen. Mark Pryor to the Honorable Julius Genachowski, Chairman, FCC (Jan. 10, 2012) (stating that the statement in the Senate and House Committee Reports excluding video clips from coverage "was intended to mean that televised programs of short duration – such as advertisements and interstitials, promotional announcements and public service announcements – are not required to be captioned online. . . . In crafting this section, it was our intent that full-length programming that has been broadcast on television with captions after the effective date of the Commission's rule be shown with captions when the programming is delivered using IP even if such programming is shown on the Internet in segments and even when some but not all segments are posted online.").

²⁰⁴ See *id.*

²⁰⁵ Any changes to the rules would be adopted through a rulemaking proceeding.

²⁰⁶ See *NPRM*, 26 FCC Rcd at 13745-46, ¶ 21.

²⁰⁷ See Consumer Groups Comments at 20; Microsoft Comments at 3-4; NCTA Comments at 20.

²⁰⁸ Consumer Groups Comments at 20-21.

²⁰⁹ See *NPRM*, 26 FCC Rcd at 13746, ¶ 22.

²¹⁰ See DIRECTV Comments at 9 (noting that foreign countries "may have different captioning requirements"); Microsoft Comments at 4 ("We support the Commission's principled and pragmatic conclusion that a broader approach would exceed the jurisdiction granted by the CVAA and would pose severe complications to parties (continued....)");

however, that the IP closed captioning requirements should apply to programming that is shown on television in another country with captions after the effective date of the new rules, because “the CVAA’s captioning requirements contain no textual limitation on programming published or exhibited on television in other countries,” and because “Consumer Groups see no tenable rationale for excluding the broad range of foreign programming that is available via Internet distribution in the United States.”²¹¹ We disagree. Although the text of the CVAA does not explicitly exclude from coverage programming shown only in another country, we conclude that Congress did not intend to reach such programming through the CVAA, which commenters have explained could create many difficulties, such as the need to reconcile different captioning requirements applicable in different countries and monitor foreign television broadcasts. Had Congress intended to create such a broad range of issues, such as those that would arise with programming shown in a foreign country, it would have said so expressly.²¹² Moreover, examination of the record reflects that there are sound reasons for excluding foreign television programming from the scope of the CVAA.²¹³

B. Compliance Deadlines

51. Section 202(b) of the CVAA requires the Commission’s regulations for closed captioning of IP-delivered video programming to “include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.”²¹⁴ We adopt the proposal from the *NPRM* to implement the schedule of compliance deadlines set forth by the VPAAC, which is as follows: (1) for programming that is prerecorded and not edited for Internet distribution, a compliance deadline of six months after the rules are published in the Federal Register; (2) for programming that is live or near-live, a compliance deadline of 12 months after the rules are published in the Federal Register; and (3) for programming that is prerecorded and edited for Internet distribution, a compliance deadline of 18 months after the rules are published in the Federal Register.²¹⁵ Having

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subject to multiple national captioning standards.”); NAB Comments at 13 (“Differing captioning standards in foreign countries would make it challenging to caption such programming for online distribution in the United States.”); NCTA Comments at 21 (“As the Commission suggests, requiring the translation of a variety of different captioning formats that may be used in programming published or exhibited on television in foreign countries would result in significant complication and delay in providing the programming with captions online.”); APTS/PBS Reply at 7 (“this approach helps alleviate many of the burdens associated with full-length, IP delivered foreign programming”); CBS Reply at 16 n. 40; DISH Network Reply at 5-6 (“First, the CVAA’s grant of jurisdiction appears to provide the Commission authority only over TV programming exhibited on TV in the United States. Second, compliance burdens across all parties, including VPOs and VPPs/VPDs, would be too burdensome if IP captioning obligations could be triggered by the programming lineups in countries anywhere in the world.”); Reply Comments of the Information Technology Industry Council at 3 (“ITI Reply”); NAB Reply at 13-14; NCTA Reply at 5-6.

²¹¹ See Consumer Groups Comments at 21.

²¹² See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (Congress “does not ...hide elephants in mouseholes”).

²¹³ See *supra* n. 210.

²¹⁴ 47 U.S.C. § 613(c)(2)(B).

²¹⁵ See *NPRM*, 26 FCC Rcd at 13748-49, ¶ 28; see also VPAAC Report at 30. A number of commenters support the proposed schedule of deadlines. See, e.g., Consumer Groups Comments at 24; NCTA Comments at 5; Consumer Groups Reply at 21-23; TWC Reply at 14-15 (supporting the proposed schedule of deadlines if the Commission does not impose technical standards); Consumer Groups Nov. 10 *Ex Parte* Letter at 2. We note the concern of some commenters that the VPAAC’s proposed schedule of deadlines was based on the assumption that SMPTE-TT would be adopted as an interchange mechanism. See MPAA Comments at 11; NCTA Comments at 6; Rovi Comments at (continued....)

reviewed the record, we conclude that adoption of the schedule of compliance deadlines proposed in the *NPRM* will provide the industry with a sufficient time frame within which to develop processes or methods for addressing such programming, and will provide consumers with access to accessible programming in the near future. We reiterate that the schedule of deadlines proposed in the *NPRM* was agreed on by the VPAAC, which includes representatives from industries that will be subject to our new rules, as well as consumer groups that have a strong interest in ensuring that our rules are implemented as quickly as possible.²¹⁶ Based on our review of the record, we conclude that compliance deadlines of six, 12, and 18 months after Federal Register publication are reasonable in light of the varying degrees of difficulty involved in closed captioning of IP-delivered prerecorded and unedited, live or near-live, and prerecorded edited video programming.²¹⁷ The compliance deadlines are applicable only to initial compliance with the rules.²¹⁸ Once a deadline has been reached for a particular category of programming, that content must be captioned immediately when delivered via IP, with the exception of updates to content already in a VPD's library.²¹⁹ Once the applicable deadline has been reached for a certain program, VPOs and VPDs must fulfill their responsibilities²²⁰ to ensure that the program has captions when delivered to end users via IP.

52. Opponents of the compliance deadlines adopted herein have not demonstrated that the deadlines would be problematic on an industry-wide basis. We find that the lengthier deadlines proposed by some commenters²²¹ are not justified because of support for the proposed deadlines in the record and by the VPAAC, which demonstrates that the proposed deadlines appear to be achievable on an industry-wide basis.²²² Further, we note that entities that find it economically burdensome to meet the deadlines may petition for an exemption.²²³ The CVAA directs us, in adopting a schedule of deadlines, to “tak[e] (Continued from previous page)

5; CBS Reply at 14; Rovi Reply at 3; NCTA *et al.* Nov. 4 *Ex Parte* Letter at 1. Our decision to adopt SMPTE-TT as a safe harbor interchange mechanism addresses these concerns. See *infra* Section V.

²¹⁶ See *NPRM*, 26 FCC Rcd at 13748-49, ¶ 28.

²¹⁷ See, e.g., NCTA Comments at 7-10 (explaining the difficulties associated with different categories of programming).

²¹⁸ Programming will not be subject to the IP closed captioning requirements unless and until it is shown on television with captions on or after the deadlines established here. Our choice of compliance deadlines recognizes that VPOs and VPDs will need to use the time between publication of our rules in the Federal Register and the compliance deadlines to develop processes or methods of addressing such programming. Before such processes or methods are in place we do not believe it is reasonable to require them to keep track of whether such programming is shown on television with captions. This approach is consistent with the CVAA's mandate that we include “an appropriate schedule of deadlines for the provision of closed captioning.” 47 U.S.C. § 613(c)(2)(B).

²¹⁹ See *supra* Section III.A.2. For such updated content, the captioning requirement will not be triggered for a period of two years from the date of Federal Register publication, as discussed above, and at that point we will impose a 45-day deadline from the date on which the programming is shown on television. Beginning three years from the date of the Federal Register publication, this deadline will be reduced to 30 days, and beginning four years from the date of the Federal Register publication, this deadline will be reduced to 15 days.

²²⁰ See *id.*

²²¹ See AT&T Comments at 13; DiMA Comments at 4, 6-7; DIRECTV Comments at 2, 12-14; Microsoft Comments at 18-19; NAB Comments at 18-20; NCTA Comments at 7 n. 12; Rovi Comments at 5; TechAmerica Comments at 2 n. 4; APTS/PBS Reply at 11-12; AT&T Reply at 12; DISH Network Reply at 8; NAB Reply at 36-38; Rovi Reply at 3-4; State Associations Reply at 6-7; Verizon Reply at 8-9. We note that some of the commenters that now propose lengthier deadlines in fact were members of the VPAAC, which recommended the proposed deadlines. See also Consumer Groups Reply at 23 (arguing against NAB's proposed lengthier deadline for local broadcasters).

²²² See *supra* n. 215.

²²³ See *infra* Section III.C.1.

into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.”²²⁴ Thus, by adopting multiple deadlines for different types of programming, the schedule of deadlines adopted herein takes into account the concerns that Congress directed the Commission to consider. We encourage VPOs and VPDs to make captioned programming available in advance of the applicable deadlines, to the extent they are able to do so.²²⁵

53. As we discuss above, VPDs that provide applications, plug-ins, or devices to consumers have an obligation under Section 202 to ensure that those applications, plug-ins, or devices render or pass through closed captions to subscribers.²²⁶ In many cases, compliance with this obligation would require the VPD to design consumer devices or software running on such devices to render or pass through closed captions. If a VPD uses software to enable the rendering or pass through of captions, the VPD is responsible only for software it deploys after the applicable compliance dates discussed in paragraph 51 above. We believe this limitation is warranted as we do not believe it is appropriate to require VPDs to provide new versions of software if the VPD did not otherwise intend to do so.²²⁷ If a VPD relies on hardware to enable the rendering or pass through of closed captions, the VPD must meet the compliance deadline of January 1, 2014. We believe this time period is appropriate because it is consistent with our analysis under Section 203.²²⁸ We note that, while the achievability standard of Section 203 of the CVAA does not apply to Section 202, VPDs that find it economically burdensome to meet their obligations may file an exemption petition, as discussed below.²²⁹

54. The CVAA also requires the Commission’s regulations to “contain a definition of ‘near-live programming’ and ‘edited for Internet distribution.’”²³⁰ In the *NPRM* the Commission sought comment on definitions of “live programming,” “near-live programming,” “prerecorded programming,” and “edited for Internet distribution.”²³¹ We explain below how we have defined these terms. The Commission proposed to apply these definitions solely to rules applicable to IP closed captioning pursuant to the CVAA.²³² We conclude that the definitions we adopt herein for the terms “live programming,” “near-live programming,” “prerecorded programming,” and “edited for Internet distribution” apply solely to our regulation of IP closed captioning, as explained further below.

55. *Live Programming.* We adopt the definition of “live programming” proposed in the

²²⁴ See 47 U.S.C. § 613(c)(2)(B).

²²⁵ See, e.g., NAB Comments at 18-19.

²²⁶ See *supra* ¶ 27.

²²⁷ We will consider upgrades to VPD software to be new applications. If a VPD is unable to meet all of the captioning requirements for such upgrades, it may request an exemption due to economic burden, as discussed in Section III.C.1 below.

²²⁸ See *infra* Section IV.H (Deadlines for Compliance). The same rationale for the two-year apparatus deadline applies to these VPD requirements.

²²⁹ See *infra* Section III.C.1. We clarify that when a VPD seeks an economic burden exemption from the requirements discussed in this paragraph, we will consider the exemption petition with regard to the specific feature(s) and device(s) for which implementing the captions purportedly would be economically burdensome, as discussed in Section IV.B (Achievability, Purpose-Based Waivers, and Display-Only Monitor Exemption), below.

²³⁰ 47 U.S.C. § 613(c)(2)(D)(i).

²³¹ See *NPRM*, 26 FCC Rcd at 13746, ¶ 23.

²³² Consumer Groups support this proposal. See Consumer Groups Comments at 21 (“[T]he Commission’s definitions of the terms . . . must be limited to the context established by the CVAA: the scheduling of deadlines.”); Consumer Groups Sept. 26 *Ex Parte* Letter at 2.

NPRM. The Commission proposed to define “live programming” as video programming that is shown on television substantially simultaneously with its performance.²³³ This definition is comparable to the definition of “live programming” adopted in the recent *Video Description Order*, which was “programming aired substantially simultaneously with its performance,”²³⁴ with a slight modification to clarify that in the IP closed captioning context, the performance occurs substantially simultaneously to its airing on television, not necessarily to the IP distribution. The Commission explained in the *NPRM* that the phrase “substantially simultaneously” contemplates that live programming may include a slight delay when it is shown on television.²³⁵ Some commenters express their support for the proposed definition of “live programming.”²³⁶ Examples of programming that may fit within the definition of “live programming” are news, sporting events, and awards shows.

56. We decline to adopt rules specifically addressing simulcast programming, that is, programming that is shown simultaneously on television and the Internet.²³⁷ Rather, live and near-live television programming that is simulcast shall be subject to the live and near-live programming compliance deadline, and prerecorded programming that is simulcast shall be subject to the prerecorded programming compliance deadlines.²³⁸ As we explained in the *NPRM*, we do not believe that the VPAAC, by mentioning simulcast programming in its definition of “live programming,” meant to encompass a “simulcast” in which prerecorded programming is shown on television and the Internet simultaneously.²³⁹ We do not believe that our decision to apply the “live” and “near-live” deadlines to the simulcast of live and near-live programming will, as NAB claims, create a significant barrier to the distribution of live or near-live programming over the Internet.²⁴⁰ Rather, we expect that the compliance deadline of 12 months from the date of publication in the Federal Register for “live” and “near-live” programming will provide a sufficient period of time within which VPOs and VPDs can develop processes or methods to ensure the immediate closed captioning of simulcasts of live and near-live

²³³ See *NPRM*, 26 FCC Rcd 13747, ¶ 24. The VPAAC proposed to define “live programming” as “programming created and presented on television and simulcast for Internet distribution to the end user as it appears on television.” VPAAC Report at 29.

²³⁴ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11866, ¶ 40 (2011) (“*Video Description Order*”).

²³⁵ See *NPRM*, 26 FCC Rcd at 13747, ¶ 24 (stating that the delay might be intended, “for example, to prevent certain objectionable material from airing”).

²³⁶ See Consumer Groups Comments at 22; ITI Reply at 4 (also arguing “that live programming should not be captioned. Live streaming over the Internet alone does not constitute ‘live programming’ in the context of the CVAA and is not subject to the CVAA.”).

²³⁷ To the extent a party believes it would be economically burdensome to comply with the captioning requirements for particular simulcast programming, it may file an exemption request. See *infra* Section III.C.1.

²³⁸ We note that all of the examples of simulcast programming provided by Consumer Groups (the Olympics, electoral coverage, and presidential addresses) likely fit within the definition of “live” or “near-live” programming adopted herein. See Consumer Groups Comments at 23. See also NAB Reply at 38-39 (responding to Consumer Groups’ proposed prohibition of delays in captioning of simulcast programming by saying that the proposals “not only ignore the explicit intent of the CVAA, but could also serve as significant barriers to making additional live and near-live content available over the Internet, including programming with captions if a VPP/VPD were unsure of its ability to prevent any delay of captioning in simulcast programming available on the Internet.”).

²³⁹ See *NPRM*, 26 FCC Rcd at 13746-47, ¶ 24; VPAAC Report at 29. We understand that a simulcast may involve either live programming or prerecorded programming. It strains common understanding of the phrase “live programming” to think that the VPAAC intended to extend the definition of that phrase to programming that is shown on television and the Internet simultaneously.

²⁴⁰ See *supra* n. 238.

programming. We note that programming aired on television substantially simultaneously with its performance would not lose its status as “live programming” by being simulcast via IP. We disagree with NCTA’s suggestion that simultaneous streaming of prerecorded programming on television and the Internet should have the same compliance schedule as live programming.²⁴¹ NCTA has not explained why a longer deadline is necessary for the simulcast of pre-recorded programming, and the record contains no evidence justifying a longer deadline.

57. *Near-Live Programming.* We adopt the same definition of “near-live programming” that the Commission adopted in the *Video Description Order*, with one modification discussed below.²⁴² In the *NPRM*, the Commission proposed to define “near-live programming” as “video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.”²⁴³ Instead, we will define “near-live programming” as “video programming that is performed and recorded less than 24 hours prior to the time it was first aired on television.”

58. The *Video Description Order* defined “near-live programming” as “programming performed and recorded less than 24 hours prior to the time it was first aired.”²⁴⁴ Industry and consumer group commenters support using that definition in the current proceeding.²⁴⁵ The *NPRM* noted certain differences between the video description and closed captioning contexts,²⁴⁶ but on further review, we find that those differences do not justify the adoption of a different definition of “near-live programming” in the IP closed captioning context as compared to the video description context. Thus, we conclude that there is no need to adopt a significantly different definition of “near-live programming” in the IP closed captioning context than in the video description context. We make one modification to the *Video Description Order*’s definition to clarify that “near-live programming,” in the context of IP closed captioning, is video programming that is performed and recorded less than 24 hours prior to the time it was first aired on television.²⁴⁷ We recognize that in the context of IP closed captioning, some “near-live” programming, such as a late-night talk show that is performed and recorded earlier the same day, may include some prerecorded elements, for example, a late-night talk show might include a segment that was performed and recorded more than 24 hours prior to its distribution on television.²⁴⁸ The presence of such

²⁴¹ See NCTA Comments at 8; see also Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 12, 2011) (“the definition of ‘live’ programming should include simulcasts”).

²⁴² The VPAAC did not agree on a single definition of “near-live programming,” with consumer group members supporting a definition of “near-live programming” as “any programming that was produced from start to finish within 12 hours of being published or exhibited on television,” and industry members supporting a definition that would reference programming that was “substantively produced” within the 12 hour limit. See VPAAC Report at 29, 34-35. Consumer Groups, in their comments to this proceeding, now express support for 24 hours as the dividing time for this type of programming. See Consumer Groups Comments at 23.

²⁴³ See *NPRM*, 26 FCC Rcd at 13747, ¶ 26.

²⁴⁴ See *Video Description Order*, 26 FCC Rcd at 11866, ¶ 40.

²⁴⁵ See Consumer Groups Comments at 23; NAB Comments at 20; NAB Reply at 15-16, 37 n. 117.

²⁴⁶ See *NPRM*, 26 FCC Rcd at 13747, n. 92.

²⁴⁷ We recognize that NCTA expresses its support for the Commission’s proposed definition in the *NPRM* of “near-live programming,” which was video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers. See *NPRM*, 26 FCC Rcd at 13747, ¶ 26; NCTA Comments at 9. We believe that the definition from the *Video Description Order* is clearer, however, and would not lead to potentially subjective determinations of what constitutes near-live programming.

²⁴⁸ See, e.g., NCTA Comments at 8-9; Letter from Blake Reid, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 15, 2011) (“Consumer Groups Dec. 15 *Ex Parte* Letter”).

prerecorded elements does not change the nature of the “near-live” programming.

59. *Prerecorded Programming.* We adopt the proposal from the *NPRM* to define “prerecorded programming” as video programming that is not “live” or “near live.”²⁴⁹ No commenter provided any substantive evaluation of the proposed definition of “prerecorded programming.” By defining “prerecorded programming” as video programming that is not “live” or “near live,” we will ensure that video programming fits within one category or the other.

60. *Edited for Internet Distribution.* We adopt the proposal from the *NPRM* to define video programming that is “edited for Internet distribution” as video programming for which the television version is substantially edited prior to its Internet distribution.²⁵⁰ We think this definition appropriately captures that class of edited video programming that might require a lengthier compliance deadline to facilitate the development of necessary procedures. No commenter proposed an alternate definition of “edited for Internet distribution.” As stated in the *NPRM*, we agree with the VPAAC that examples of “substantial edits” include the deletion of scenes or alterations to the televised version of musical scores, and that changes to the number or duration of advertisements would not constitute “substantial edits.”²⁵¹ We do not agree with NAB that distinguishing between “prerecorded programming” and “edited for Internet distribution” would be unworkable²⁵² because the VPAAC provided clear examples and explanations of what constitutes substantial edits and what does not.²⁵³

C. Exemption Process

1. Case-by-Case Exemptions

61. Section 713(d)(3) of the Act originally authorized the Commission to grant an individual exemption from the television closed captioning rules upon a showing that providing closed captioning “would result in an undue burden.”²⁵⁴ Congress provided guidance to the Commission on how it should evaluate such captioning exemptions by setting forth, in Section 713(e) of the Act, four “factors to be considered” in determining whether providing closed captioning “would result in an undue economic burden:” (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner;

²⁴⁹ See *NPRM*, 26 FCC Rcd at 13748, ¶ 27.

²⁵⁰ See *NPRM*, 26 FCC Rcd at 13748, ¶ 27. The VPAAC proposed defining programming that is “prerecorded and edited for Internet distribution to the end user” as “any programming that is prerecorded and has been substantially edited for Internet distribution to the end user.” VPAAC Report at 30.

²⁵¹ See *NPRM*, 26 FCC Rcd at 13748, ¶ 27; see also VPAAC Report at 30.

²⁵² See NAB Comments at 17-18. In making this argument, NAB claims that, since VPDs generally lack a right to create derivative works when distributing a VPO’s television programming online, there is no need to distinguish between “prerecorded programming” and “edited for Internet distribution.” See *id.* We understand that rights issues may, for example, necessitate changes in music scores from the television version to the IP version of a television program, which may also necessitate changes to the captioning from one version to the other. See VPAAC Report at 30. Regardless of whether the VPO itself makes these changes or the VPD is authorized to make the changes, we find that the need for such changes justifies a longer compliance deadline for prerecorded edited video programming than for prerecorded unedited video programming. See also NCTA Comments at 10 (prerecorded programming that is edited for Internet distribution “requires not only the specialized equipment and software required for all captioning, but also modifications to the underlying captions. A longer compliance timeframe is thus warranted.”).

²⁵³ In contrast, in paragraphs 57-58 above, we rejected the proposed definition that involved the use of the word “substantively.” We note that the VPAAC and commenters did not provide a clear, workable means of determining whether programming was “substantively” recorded and produced within a given time frame.

²⁵⁴ 47 U.S.C. § 613(d)(3) (as originally enacted).

and (4) the type of operations of the provider or program owner.²⁵⁵

62. In the CVAA, Congress amended Section 713(d)(3) of the Act by replacing the term “undue burden” with the term “economically burdensome,” and by adding certain guidance on the exemption procedures.²⁵⁶ Amended Section 713(d)(3) provides as follows:

[A] provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome. During the pendency of such a petition, such provider or owner shall be exempt from the requirements of this section. The Commission shall act to grant or deny any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.²⁵⁷

The Senate Committee on Commerce, Science, and Transportation encouraged the Commission, in determining whether the requirements enacted under Section 202(b) are “economically burdensome,” to consider the factors listed in pre-existing Section 713(e) of the Act, listed above.²⁵⁸

63. We adopt the proposal in the *NPRM* and create a process by which VPDs and VPOs may petition the Commission on a case-by-case basis for a full or partial exemption of their IP closed captioning obligations, which the Commission may grant upon a finding that the requirements would be economically burdensome.²⁵⁹ This process is comparable to the Commission’s procedures for assessing exemption requests from our television closed captioning rules prior to the amendment of Section 713(d)(3), and nearly identical to the procedures for exemptions based on economic burden that the Commission recently adopted for video description.²⁶⁰ We will provide in our rules that the petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements for closed captioning of video programming delivered via Internet protocol would be economically burdensome. The term “economically burdensome” means imposing significant difficulty or expense.²⁶¹ In addition to the four statutory factors enumerated above, the petitioner must describe any other factors it deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the IP closed captioning requirements, for example, text or graphic display of the content of the audio portion of the programming. The Commission will place

²⁵⁵ 47 U.S.C. § 613(e); see also 47 C.F.R. §§ 79.1(f)(2)(i)-(iv).

²⁵⁶ See Pub. L. No. 111-260, § 202(c). In the text, Congress described its revision to Section 713(d)(3) as a “conforming amendment” without explaining what it meant by that term.

²⁵⁷ 47 U.S.C. § 613(d)(3). Because the statutory provision regarding exemptions due to economic burden references only VPPs and VPOs, our rule implementing this provision also will reference VPPs and VPOs, but not VPDs. We note, however, that the exclusion of VPDs has no practical effect as we have defined VPD and VPP as having the same meaning.

²⁵⁸ See Senate Committee Report at 14.

²⁵⁹ See *NPRM*, 26 FCC Rcd at 13749-50, ¶ 30. Several commenters support the Commission’s proposed approach to case-by-case exemptions. See, e.g., Google Comments at 8 n. 17; NAB Comments at 21-22; Consumer Groups Reply at 10; NAB Reply at 20.

²⁶⁰ See 47 C.F.R. §§ 79.1(f), 79.3(d). See also *Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, Order and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14957-62, ¶¶ 30-39 (2011) (“*Interim Standard Order and NPRM*”).

²⁶¹ See *Video Description Order*, 26 FCC Rcd at 11881 (App. A - Final Rules).

exemption petitions on public notice, and any interested person may file comments or oppositions to the petition within 30 days after release of the public notice of the petition. Within 20 days after the close of the period for filing comments or oppositions, the petitioner may reply to any comments or oppositions filed.²⁶² Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements. Those filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

64. We disagree with those commenters who contend that Congress expressly amended Section 713(d) to lower the applicable burden, and that the “economically burdensome” standard is broader than the previous “undue burden” standard.²⁶³ In the recent *Interim Standard Order*, the Commission interpreted on a provisional basis the term “economically burdensome” as used in Section 202 of the CVAA to be synonymous with the term “undue burden” that was formerly used in Section 713(e) of the Act.²⁶⁴ The Commission stated “that Congress, when it enacted the CVAA, intended for the Commission to continue using the undue burden factors contained in Section 713(e), as interpreted by the Commission and reflected in Commission rules and precedent, for individual exemption petitions, rather than to make a substantive change to this standard.”²⁶⁵ Among other things, in that proceeding the Commission cited to the legislative history of the 1996 amendments to the Act, in which Congress clearly distinguished between the more extensive factors that should be used to evaluate categorical exemptions adopted by regulation under Section 713(d)(1) of the Act and the factors that should be used to evaluate the individual exemption requests submitted under Section 713(d)(3) of the Act.²⁶⁶ Accordingly, we disagree with any suggestion that the Commission should apply the broader standards applicable to categorical exemption requests to our consideration of individual exemption requests in the IP closed captioning context. Rather, we interpret the term “economically burdensome” in Section 713(d)(3) of the Act, as amended by the CVAA, to be synonymous with the term “undue burden” as this section was originally drafted.²⁶⁷

65. Thus, consistent with the analyses in the *Interim Standard Order* and the *Video Description Order*, we adopt the process proposed in the *NPRM* for case-by-case exemptions based on economic burden with a few minor modifications.²⁶⁸ First, in the *NPRM* the Commission proposed the

²⁶² See *infra* ¶ 66 (discussing the option of service via email).

²⁶³ See, e.g., NCTA Comments at 17; Verizon Comments at 5-6; NCTA Reply at 12; NAB Reply at 20 n. 64; Verizon Reply at 8; but see NCRA Comments at 4; Consumer Groups Reply at 11.

²⁶⁴ In the *Notice of Proposed Rulemaking* that accompanied the *Interim Standard Order*, the Commission sought comment on making permanent this provisional interpretation of “economically burdensome.” See *Interim Standard Order and NPRM*, 26 FCC Rcd at 14961-62, ¶¶ 38-39. The Commission has received one comment in response, which supports this interpretation. See *Telecommunications for the Deaf and Hard of Hearing, Inc., et al.*, Comments in CG Docket No. 11-175, Dec. 1, 2011, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021748970>.

²⁶⁵ See *Interim Standard Order and NPRM*, 26 FCC Rcd at 14957, ¶ 30.

²⁶⁶ See *id.* at 14958-59, ¶ 34. See also *id.* at 14960, ¶ 36 (“Congress was well aware of the existence of the additional categorical exemption criteria under section 713(d)(1) at the time that it enacted the CVAA, and that the Commission had never applied these factors in the context of individual exemption determinations. Had it intended for these additional factors to apply to individual captioning exemption determinations, it presumably would have directed the Commission to do so.”).

²⁶⁷ See *id.* at 14960, ¶ 36; *Video Description Order*, 26 FCC Rcd at 11868-69, ¶ 44.

²⁶⁸ We note that Consumer Groups make additional proposals about case-by-case exemption petitions. See Consumer Groups Comments at 24-26. Because we intend to address exemption petitions on a case-by-case basis, we decline to adopt the categorical findings suggested by Consumer Groups. Further, neither the language nor the (continued....)

following language in what is now numbered new Section 79.4(d)(3) of our rules: “The Commission will evaluate economic burden with regard to the individual outlet *or programming*.”²⁶⁹ In the context of the IP closed captioning rules, the “individual outlet” references the VPO or VPD. To be consistent with Section 79.1(f)(3) as it now exists in the Commission’s rules and as the Commission has proposed amending it in the *Interim Standard Order and NPRM* and with Section 79.3(d)(3) as adopted in the *Video Description Order*, we will omit the phrase “or programming.”²⁷⁰ As we explained in the *1997 Closed Captioning Order*, in evaluating economic burden, we “examine the overall budget and revenues of the individual outlet and not simply the resources it chooses to devote to a particular program.”²⁷¹ Consistent with that directive, when deciding whether to grant a petition for an exemption from the IP closed captioning rules, we will consider the overall budget and revenues of the individual outlet and its ability to provide closed captioning, and not simply the resources it chooses to devote to a particular program.²⁷² Second, in the *NPRM* the Commission proposed to codify the following language in our rules governing exemption petitions based on economic burden: “The Commission shall act to deny or approve any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.”²⁷³ Consistent with the *Interim Standard Order and NPRM* and the adopted rules in the *Video Description Order*, we find it unnecessary to codify in our rules the time limit for Commission action on exemption petitions, since the 6-month deadline for Commission action is codified in the CVAA and thus it applies regardless of whether it is codified in our rules.²⁷⁴ Third, in the *NPRM* the Commission proposed to include the following language in what is now numbered new Section 79.4(d)(11): “During the pendency of an economic burden determination, the Commission will consider the video programming provider or owner subject to the request for exemption as exempt from the requirements of this section.”²⁷⁵ To be consistent with Section 79.1(f)(11) as proposed in the *Interim Standard Order and NPRM* and with Section 79.3(d)(11) as adopted in the *Video Description Order*, we will omit the words “provider or owner” from Section 79.4(e)(11) as proposed in

(Continued from previous page)

history of the CVAA indicates that Congress intended to require a heightened *prima facie* showing for such petitions, as suggested by Consumer Groups. *See id.*

²⁶⁹ See *NPRM*, 26 FCC Rcd at 13770 (App. A - Proposed Rule Changes) (emphasis added).

²⁷⁰ The Commission’s television closed captioning rules currently require consideration of the extent to which the provision of closed captions will create an undue burden with regard to the individual outlet. *See* 47 C.F.R. § 79.1(f)(3). The *Interim Standard Order and NPRM* proposes to amend this section by replacing the term “undue burden” with the term “economically burdensome,” in accordance with the changes made in the CVAA. *See Interim Standard Order and NPRM*, 26 FCC Rcd at 14989 (App. B - Proposed Rules); 47 C.F.R. § 79.3(d)(3).

²⁷¹ *1997 Closed Captioning Order*, 13 FCC Rcd at 3365-66, ¶ 204 (rejecting an approach that would only consider resources available for a specific program because it “could unnecessarily limit the availability of captioning and would thus also frustrate Congressional intent.”). *See also Outland Sports, Inc.*, 16 FCC Rcd 13605, 13607, ¶ 6 (CSB, 2001) (applying ¶ 204 of the *1997 Closed Captioning Order* and citing “the overall budget and revenues of the individual outlet, and not simply the resources [a petitioner] chooses to devote to a particular program” as relevant to deciding an undue burden petition).

²⁷² *See 1997 Closed Captioning Order*, 13 FCC Rcd at 3365, ¶ 204.

²⁷³ *See NPRM*, 26 FCC Rcd at 13770-71 (App. A - Proposed Rule Changes).

²⁷⁴ *See Interim Standard Order and NPRM*, 26 FCC Rcd at 14989 (App. B - Proposed Rules); 47 C.F.R. § 79.3(d)(10); *see also* 47 U.S.C. § 613(d)(3).

²⁷⁵ *See NPRM*, 26 FCC Rcd at 13771 (App. A - Proposed Rule Changes). Of course, the programming will still be subject to the closed captioning requirements under 47 C.F.R. § 79.1 when provided on broadcast television or by an MVPD, notwithstanding its exemption from the IP closed captioning requirements under 47 C.F.R. § 79.4.

the *NPRM*.²⁷⁶ By revising the proposed language to omit those words, we intend to clarify that the outlet seeking an exemption is relieved of its closed captioning obligations only for the specific programming for which it requested an exemption.

66. Finally, we will require electronic filing of individual closed captioning exemption requests, and will require electronic filing of comments on and oppositions to such petitions. We hereby delegate to the Chief, Consumer and Governmental Affairs Bureau, authority to establish by Public Notice the electronic filing procedures for individual exemption requests. Such a requirement is consistent with the *2011 Electronic Filing Report and Order*, in which the Commission adopted a requirement to use electronic filing whenever technically feasible.²⁷⁷ Although the *NPRM* proposed to require paper filings,²⁷⁸ we find that an electronic filing requirement would be most consistent with the Commission's stated goals of efficiency and modernization²⁷⁹ and would streamline the petition process for all parties. Persons who file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy, and any petitioner filing a reply to comments or oppositions must serve the commenting or opposing party with a copy of the reply and must include a certification that the party was served with a copy. We clarify that pursuant to Section 79.4(d)(7), comments or oppositions and replies shall be served upon a party, its attorney, or its other duly constituted agent by delivery or mailing a copy to the party's last known address, or by service via e-mail as provided in the final rules.²⁸⁰

2. Categorical Exemptions

67. In Section 202(b) of the CVAA, Congress provided that the Commission "may exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment."²⁸¹ In the context of television closed captioning, the Commission has recognized that the term "economically burdensome" is applied differently to case-by-case exemptions than it is to rulemaking decisions to exempt categories of programming.²⁸² Existing rules for closed captioning of television programming contain a number of categorical exemptions.²⁸³ In the *NPRM*, the Commission sought comment on whether any of the

²⁷⁶ See *Interim Standard Order and NPRM*, 26 FCC Rcd at 14990 (App. B - Proposed Rules); 47 C.F.R. § 79.3(d)(11).

²⁷⁷ *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1599-1600 at ¶ 15 (2011) ("*2011 Electronic Filing Report and Order*").

²⁷⁸ See *NPRM*, 26 FCC Rcd at 13750, ¶ 31. NAB suggests that the Commission permit but not require electronic filing of exemption requests. See NAB Comments at 23.

²⁷⁹ See *2011 Electronic Filing Report and Order*, 26 FCC Rcd at 1599-1602, ¶¶ 14-21.

²⁸⁰ See *infra* App. B.

²⁸¹ 47 U.S.C. § 613(c)(2)(D)(ii).

²⁸² See *Interim Standard Order and NPRM*, 26 FCC Rcd at 14958, ¶ 33; see also Reply Comments of CTIA-The Wireless Association at 7 ("CTIA Reply") ("When used to grant exemptions from the Act, the 'economically burdensome' standard is a much broader inquiry than when considering whether to grant individual waivers under the 'economically burdensome' standard.").

²⁸³ See 47 C.F.R. § 79.1(d). The Commission created exemptions for the following categories of programs and providers: programming subject to contractual captioning restrictions; video programming or a video programming provider for which the captioning requirement has been waived; programming other than English or Spanish language; primarily textual programming; programming distributed in the late night hours; interstitials, promotional announcements and public service announcements; Educational Broadband Service programming; locally produced (continued....)

categorical exemptions found in the television closed captioning rules should apply to IP closed captioning.²⁸⁴

68. We decline at this time to apply any of the categorical exemptions found in the television closed captioning rules to the IP closed captioning rules.²⁸⁵ Thus, programming that appears on television with captions after the effective date of the IP closed captioning rules will be subject to the rules even if the programming was exempt from the television closed captioning requirements but was nevertheless captioned voluntarily. Programming that is exempt from the television closed captioning requirements and that never appears on television with captions is not subject to the IP closed captioning requirements, which by definition do not apply to programming that appears on television only without captions. The record does not contain sufficient evidence to demonstrate that it would be economically burdensome to require captioning of programming that would fit within one of the television exemptions, if that programming was shown on television with captions after the effective date of our new rules. This approach we adopt is consistent with the CVAA, which requires “closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.”²⁸⁶ If Congress intended to limit the IP closed captioning rules to programming that “was *required to be* published or exhibited on television with captions,” it would have said so.

69. We emphasize an important difference between exemptions for closed captioning of IP-delivered video programming and exemptions for closed captioning of television programming. In the television context, programming that is exempt from the closed captioning requirements may never have been associated with a closed captioning file. In contrast, the IP closed captioning rules only apply to programming that was captioned on television,²⁸⁷ and thus, they do not require the creation of closed captions where captions did not already exist. We acknowledge that a particular program may be shown on television both without captions by an entity that is exempt under the television closed captioning rules, and with captions by an entity that is not exempt. Once the program is shown on television with captions after the effective date of our new rules, all VPDs must enable the rendering or pass through of closed captions to the end user, except for any VPD that obtains an individual exemption due to economic burden pursuant to the procedures adopted above.²⁸⁸

70. We reject the categorical exemptions proposed by CTIA, NCTA, and Starz. CTIA requests an exemption from the requirements of Section 202 of the CVAA for mobile service providers.²⁸⁹ NCTA suggests that a new network that is exempt from the television closed captioning

(Continued from previous page) _____

and distributed non-news programming with no repeat value; programming on new networks; primarily non-vocal music programming; captioning expense in excess of two percent of gross revenues; channels producing revenues of under \$3,000,000; and locally produced educational programming.

²⁸⁴ See *NPRM*, 26 FCC Rcd at 13750-51, ¶ 32.

²⁸⁵ Several commenters support this approach. See, e.g., Consumer Groups Comments at 27; Google Comments at 8 n. 17; NCRA Comments at 4; Consumer Groups Reply at 8-10. But see EWTN Comments at 1-3 (arguing that the Commission should adopt categorical exemptions where the captioning expense exceeds two percent of gross revenues, and where channels produce revenues of under \$3,000,000); NAB Comments at 13, 23-25 (arguing that the Commission should adopt categorical IP closed captioning exemptions comparable to the categorical television closed captioning exemptions); NCTA Comments at 18 (same); CTIA Reply at 8; NAB Reply at 14, 22-23.

²⁸⁶ 47 U.S.C. § 613(c)(2)(A).

²⁸⁷ See *id.*

²⁸⁸ See *supra* Section III.C.1.

²⁸⁹ CTIA Comments at 11-14; CTIA Reply at 2. See also *infra* ¶ 107 (declining CTIA’s request for an exemption from the Section 203 requirements for mobile devices).

requirements should also be exempt from the IP closed captioning requirements.²⁹⁰ Starz requests “that the Commission clarify that VPOs need not caption other programming streamed through VPOs’ websites” besides linear and video-on-demand programming streamed to authenticated subscribers.²⁹¹ We find that these requested categorical exemptions are overly broad and not sufficiently supported by the record, the statute, or legislative history.²⁹² None of these parties demonstrates that compliance with the IP closed captioning requirements would be an economic burden for an entire category of entities. Further, we will consider on a case-by-case basis petitions requesting an exemption based on economic burden filed by a particular mobile service provider, new network, or other person or entity.

71. We also adopt the *NPRM* proposal not to delay implementation of, or waive, the rules as applied to live programming, except by adopting the VPAAC recommendation to provide a lengthier compliance deadline for live programming than that provided for prerecorded programming that is not edited for Internet distribution. Section 202(b) of the CVAA permits the Commission to delay or waive the applicability of its IP closed captioning rules “to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be economically burdensome to providers of video programming or program owners.”²⁹³ The VPAAC considered the special nature of live programming by proposing a longer compliance deadline for live programming than for prerecorded and unedited video programming, which we adopt above.²⁹⁴ We do not see any justification for a further delay or waiver of the Commission’s new IP closed captioning rules as applied to live programming at this time.²⁹⁵

D. *De Minimis* Failure to Comply and Alternate Means of Compliance

72. *De Minimis Failure to Comply.* Section 202(b) of the CVAA requires the Commission’s IP closed captioning regulations to “provide that *de minimis* failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.”²⁹⁶ The statute and legislative history did not elaborate upon the meaning of “*de minimis* failure to comply.” In the *NPRM*, the Commission proposed that, to determine whether a failure to comply is *de minimis*, it would “consider the particular circumstances of the failure to comply, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, and the time frame within which the failure was remedied.”²⁹⁷

73. We adopt the proposed rule, which provides that a video programming provider or owner’s *de minimis* failure to comply with Section 79.4 of our rules shall not be treated as a violation of

²⁹⁰ NCTA Comments at 17-18.

²⁹¹ Starz Comments at 8-9.

²⁹² See Letter from Edward J. Markey, U.S. Representative, *et al.* to The Honorable Julius Genachowski, Chairman, FCC, at 2 (Sept. 14, 2011) (“In response to requests for exemptions . . . the Commission should be guided by the central purpose of the CVAA – to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”).

²⁹³ 47 U.S.C. § 613(c)(2)(C).

²⁹⁴ See *supra* Section III.B.

²⁹⁵ See *NPRM*, 26 FCC Rcd at 13751, ¶ 33. See also Consumer Groups Comments at 28.

²⁹⁶ 47 U.S.C. § 613(c)(2)(D)(vii). Because the statutory provision regarding *de minimis* failures to comply references only VPPs and VPOs, our rule implementing this provision also will reference VPPs and VPOs, but not VPDs. We note, however, that the exclusion of VPDs has no practical effect as we have defined VPD and VPP as having the same meaning.

²⁹⁷ See *NPRM*, 26 FCC Rcd at 13755-56, ¶ 41.

the requirements.²⁹⁸ We intend to apply the *de minimis* standard in a flexible manner, consistent with our approach in the television realm, rather than specifying particular criteria that we will apply to make a *de minimis* determination. In the television context, “[i]n considering whether an alleged violation has occurred, [the Commission] will consider any evidence provided by the video programming distributor in response to a complaint that demonstrates that the lack of captioning was *de minimis* and reasonable under the circumstances.”²⁹⁹ This approach is also supported by the record.³⁰⁰ Thus, we decline to adopt specific criteria that we will consider in evaluating whether a failure to comply is *de minimis*.³⁰¹

74. *Alternate Means of Compliance.* Section 202(b) of the CVAA provides that “[a]n entity may meet the requirements of this section through alternate means than those prescribed by regulations pursuant to subsection (b), as revised pursuant to paragraph (2)(A) of this subsection, if the requirements of this section are met, as determined by the Commission.”³⁰² Should an entity seek to use an “alternate means” to comply with the IP closed captioning requirements, that entity may either (i) request a Commission determination that the proposed alternate means satisfies the statutory requirements through a request pursuant to Section 1.41 of our rules;³⁰³ or (ii) claim in defense to a complaint or enforcement action that the Commission should determine that the party’s actions were permissible alternate means of compliance. Rather than specify what may constitute a permissible “alternate means,” we conclude that the best means of implementing this provision is to address any specific requests from parties subject to the new IP closed captioning rules when they are presented to us.

E. Complaint Procedures

75. In the *NPRM*, the Commission proposed to adopt procedures for complaints alleging a

²⁹⁸ This language is intended to make clear that *de minimis* violations will not lead to enforcement actions. See NAB Reply at 30.

²⁹⁹ 1998 *Closed Captioning Recon. Order*, 13 FCC Rcd at 19979, ¶ 10. ACA supports the approach of relying on the Commission’s established approach to *de minimis* failures to comply with television closed captioning regulations. See ACA Comments at 18; see also CBS Reply at 19 n. 51; NCTA Reply at 10.

³⁰⁰ See, e.g., ACA Comments at 19 (“The Commission should therefore take a flexible approach and not attempt to prospectively identify the criteria of a *de minimis* failure to provide or distribute video programming using IP distribution on the Internet, but rather inquire on a case-by-case basis whether the lack of captioning was ‘*de minimis* and reasonable under the circumstances.’”).

³⁰¹ See *NPRM*, 26 FCC Rcd at 13755, ¶ 41. Accordingly, we need not at this time further address commenters’ arguments regarding the appropriate scope of a *de minimis* failure to comply. See, e.g., Consumer Groups Comments at 31-32 (arguing that the Commission should adopt the narrowest possible definition of *de minimis* failure to comply); Microsoft Comments at 9 (urging the Commission to clarify that a one-time, unintentional machine or software failure constitutes a *de minimis* violation); ITI Reply at 5 (“The Commission should clarify in its Order that a one-time, unintentional machine or software failure constitutes a *de minimis* violation, and allow the manufacturer the opportunity to remedy the violation rather than automatically trigger an enforcement action and/or corresponding fine.”); NAB Reply at 30-31 (arguing that the Consumer Groups’ proposed approach to *de minimis* violations “would entirely undercut the statute’s *de minimis* enforcement exemption and would constitute an unwarranted limitation on the Commission’s discretion with respect to enforcement matters”). Rather than specifying what may constitute a *de minimis* failure to comply, we will adopt the same approach that we have taken in addressing *de minimis* violations of the television closed captioning requirements.

³⁰² 47 U.S.C. § 613(c)(3). As explained in the *NPRM*, the statute and legislative history did not elaborate upon the meaning of “alternate means” in this provision, although the House Committee explained that in the context of Section 203, alternate means was intended “to afford entities maximum flexibility in meeting the requirement that video programming delivered using Internet protocol be captioned,” and that the Commission should “provide some flexibility where technical constraints exist.” House Committee Report at 31.

³⁰³ 47 C.F.R. § 1.41 (Informal requests for Commission action).

violation of the IP closed captioning rules that are analogous to the procedures the Commission uses for complaints alleging a violation of the television closed captioning rules, with certain modifications.³⁰⁴ Commenters generally support the Commission's proposed approach of modeling the IP closed captioning complaint process on the existing television closed captioning complaint process.³⁰⁵ As explained below, we adopt these proposals with certain enhancements and changes.³⁰⁶

76. *Timing of Complaint.* In the *NPRM*, the Commission asked whether to impose the same 60-day time frame for complaints involving IP-delivered video programming as for complaints involving programming aired on television.³⁰⁷ We recognize that determining the date on which IP-delivered video programming was noncompliant may be more difficult than determining the date on which television programming was noncompliant, since television programming often airs at specified times whereas IP-delivered video programming may be available continuously. If IP-delivered video programming is available without required captioning, then it is noncompliant during the entire time that it is available. A number of commenters support the adoption of a filing deadline for complaints alleging violations of the IP closed captioning rules based on the date on which the consumer experienced the captioning problem, explaining that it would provide VPDs and VPOs with some certainty as to previously distributed content, and would ensure that the complaint process occurs when evidence is fresh.³⁰⁸ Some commenters support a 60-day time frame, while others support a shorter or longer time frame.³⁰⁹

77. We adopt the proposed 60-day time frame and require that complaints be filed within 60 days after the complainant experiences a problem with the captioning of IP-delivered video programming.³¹⁰ We recognize that problems with captions of IP-delivered video programming often may be ongoing, in that a program may remain online without captions for a period of time. We will require the consumer to file a complaint within 60 days of any date on which the consumer accessed the programming and did not receive compliant captions. The Commission will accept a consumer's allegations as to the timeliness of a complaint as true, unless a VPO or VPD demonstrates otherwise. Establishing a deadline based on the date the complainant accessed noncompliant programming will provide certainty to VPOs and VPDs and ensure that the evidence available at the time of the complaint remains fresh. The 60-day time frame, in particular, has worked well in the television context, and we

³⁰⁴ See *NPRM*, Section III.G. See also 47 C.F.R. § 79.1(g) (setting forth procedures for complaints involving violations of the television closed captioning rules).

³⁰⁵ See, e.g., ACA Comments at 17; DIRECTV Comments at 14; NAB Comments at 31; CBS Reply at 18.

³⁰⁶ The complaint procedures discussed in this *Report and Order* address the process by which the Commission's Consumer and Governmental Affairs Bureau processes complaints. This process differs from that of the Commission's Enforcement Bureau, which investigates whether a violation has occurred and, if so, what penalty to assess, regardless of whether a complaint has been filed.

³⁰⁷ See *NPRM*, 26 FCC Rcd at 13757, ¶ 44.

³⁰⁸ See, e.g., AT&T Comments at 14-15; DIRECTV Comments at 15; AT&T Reply at 9; NAB Reply at 31-32; NCTA Reply at 8.

³⁰⁹ See, e.g., AT&T Comments at 14-15 (supporting a 60 day time frame); DIRECTV Comments at 15 (suggesting a 30-day time frame from the date the consumer first accessed the video programming at issue); NAB Comments at 32 n. 72 (suggesting a 75-day time frame, given the complexities of the Internet ecosystem); AT&T Reply at 9 (supporting a 60 day time frame); NCTA Reply at 8 (the Commission should "ensure that complaints are filed as soon as possible after a problem is discovered.") (footnote omitted). Consumer Groups argue that there should not be a time limit for the filing of IP closed captioning complaints, but if one was adopted, it should be at least 60 days. See Consumer Groups Comments at 33.

³¹⁰ See also 47 C.F.R. § 79.1(g)(1). We note that the statute precludes private rights of action to enforce any requirement of Section 713 of the Act, including the IP closed captioning requirements, and the Commission has exclusive jurisdiction with respect to any complaint under Section 713 of the Act. See 47 U.S.C. § 613(j).

therefore find it appropriate to use the same deadline here.

78. We find that it is important to provide a limit on the time within which a complaint must be filed, so that evidence is available to adjudicate the complaint properly. For example, even if a particular program remains available via IP, technical problems with the consumer's device or Internet connection on a specific date might have been the cause of a particular captioning problem, and it might be difficult to make that determination if too much time has elapsed. We disagree with Consumer Groups that the time frame should begin at the last time the violating video was distributed to any consumer.³¹¹ Some video programming may be available online for years, and so it may be difficult to investigate a complaint filed by a consumer years after the captioning problem occurred.

79. *Option to File Complaints with the Commission or with the VPD.* Similar to the television closed captioning rules, we will create a process for complainants to file their complaints either with the Commission or with the VPD responsible for enabling the rendering or pass through of the closed captions for the video programming.³¹² First, we adopt a process by which complainants may file complaints with the Commission, and those complaints may be directed against a particular VPD or VPO. Second, to encourage the prompt resolution of complaints in the marketplace, we also adopt a process by which complainants may first file their complaints with the VPD, and if complainants are not satisfied by that process, they may then file their complaints with the Commission. These procedures are discussed further below. We do not create a process by which complainants may first file their complaints with the VPO, because VPOs generally do not maintain direct relationships with consumers and may lack the ability to provide consumers with means of access such as the contact information we require below of VPDs.

80. In the *NPRM*, the Commission asked whether we should permit those filing complaints alleging a violation of the IP closed captioning rules to file the complaint directly with the VPD first, or whether it is instead preferable to require all complaints to come directly to the Commission in the first instance.³¹³ Some commenters support a Commission procedure for filing complaints with the VPD first.³¹⁴ Permitting the filing of complaints directly with the VPD, and allowing the VPD to attempt to resolve the complaint with the consumer before the Commission engages in enforcement proceedings, would benefit VPDs by minimizing their involvement in complaint proceedings at the Commission and may benefit consumers by fostering a prompt resolution of their complaints. Thus, we adopt procedures to permit complainants to file their complaints either with the Commission or with the VPD responsible for enabling the rendering or pass through of the closed captions for the video programming.³¹⁵

81. Consumers who file their complaints first with the Commission may name a VPD or VPO in the complaint, since both entities are subject to the IP closed captioning rules. The Commission will forward such complaints to the named VPD and/or VPO, as well as to any other VPD or VPO that Commission staff determines may be involved, as discussed further below. If a complaint is filed first with the VPD, our rules will require the VPD to respond in writing to the complainant within thirty (30)

³¹¹ See Consumer Groups Comments at 33.

³¹² See 47 C.F.R. § 79.1(g)(1).

³¹³ See *NPRM*, 26 FCC Rcd 13757, ¶ 45.

³¹⁴ See, e.g., Consumer Groups Comments at 34; NAB Comments at 33; NCRA Comments at 4-5; NAB Reply at 32.

³¹⁵ The record does not support the creation of a process by which consumers file complaints directly with the VPO. We find it unlikely in any event that a consumer would choose to file a complaint with a VPO, with which it has no direct relationship, instead of with a VPD from which it receives IP-delivered video programming. Of course, any consumer that wishes to contact a VPO to share a captioning concern may do so.

days after receipt of a closed captioning complaint.³¹⁶ If a VPD fails to respond to the complainant within thirty (30) days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within thirty (30) days after the time allotted for the VPD to respond. If the consumer then files the complaint with the Commission (after filing with the VPD), the Commission will forward the complaint to the named VPD, as well as to any other VPD or VPO that Commission staff determines may be involved.³¹⁷ If the Commission is aware that a complaint has been filed simultaneously with the Commission and the VPD, the Commission may allow the process involving the VPD and the consumer to reach its conclusion before moving forward with its complaint procedures, in the interest of efficiency.³¹⁸

82. The flexible complaint process adopted herein will benefit consumers because it enables them to file their complaints with the Commission naming either the VPD or the VPO. We reiterate our expectation that consumers generally will name the VPD in their complaints, since that is the entity that distributes the programming to consumers.³¹⁹ Nevertheless, if a consumer names a VPD in its complaint but the Commission determines that its investigation should be directed against the VPO, the Commission will forward the complaint to the VPO without any further involvement of the consumer.³²⁰ In addition, if a VPD receives a complaint from the Commission that it believes the Commission should have directed to the VPO, the VPD may say so in its response to the complaint. In such instances, however, the VPD's response must also indicate the identity and contact information of the VPO to which the VPD believes the complaint should be directed. Since consumers may file any IP closed captioning complaint with the VPD or name the VPD in any complaint filed with the Commission, we find that Consumer Groups' concern that consumers may be unable to determine the entity against which they should file a complaint is unfounded,³²¹ because consumers are not required to name or otherwise identify the applicable VPO. The complaint process will be aided further by the Commission's ability to request additional information from any relevant entities when, in the estimation of Commission staff, such information is needed to

³¹⁶ If a VPD receives a complaint directly from a consumer but believes that the captioning problem was caused by the VPO, the VPD may indicate in its response to the consumer that the consumer may choose to file a complaint with the Commission against the VPO. To the extent a VPD believes that fault for the captioning problem lies elsewhere, the VPD should make this clear, and provide any other relevant information, in its written response to the consumer.

³¹⁷ These procedures are consistent with procedures in our existing television closed captioning rules. See 47 C.F.R. § 79.1(g)(4).

³¹⁸ We note Consumer Groups' proposal that Commission enforcement proceedings and VPD attempts at remediation should occur concurrently. See Consumer Groups Comments at 34. In response, AT&T explains that the proposal of Consumer Groups would violate the Administrative Procedure Act and the Constitutional guarantee of due process. See AT&T Reply at 10. The Commission may not be aware that a complaint has been filed simultaneously with the Commission and with a VPD, but when so informed, the Commission will provide the VPD with the 30-day period after the VPD received the complaint to resolve the complaint with the complainant first, in the interest of efficiency.

³¹⁹ See *NPRM*, 26 FCC Rcd at 13757, ¶ 45.

³²⁰ CBS and NAB express concern that initiating simultaneous investigations by sending the complaint to both the VPD and VPO would create confusion and waste resources. See NAB Comments at 33; CBS Reply at 19. While the complaint procedures proposed in the *NPRM* would provide the Commission with needed flexibility to reach the responsible entity or entities, we do not intend to burden parties by engaging in simultaneous investigations, where a complaint can best be resolved by focusing the Commission's investigation on a single party or on one party followed by another party.

³²¹ See Consumer Groups Sept. 26 *Ex Parte* Letter at 1.

investigate the complaint or adjudicate potential violation(s) of Commission rules.³²²

83. *Complaint Response Time.* Upon receipt of a complaint from the Commission, we will require the VPD and/or VPO to respond in writing to the Commission and the complainant within 30 days. We conclude that the record does not support deviating from the 30-day time frame contained in the television closed captioning rules for responding to complaints.³²³ While Consumer Groups propose that the Commission instead require VPDs to respond to complaints within 15 calendar days,³²⁴ we agree with other commenters that such a short deadline would be unworkable.³²⁵ Although in the *NPRM* the Commission proposed to provide explicitly in our rules that the Commission may specify response periods longer than 30 days on a case-by-case basis,³²⁶ we find it unnecessary to do so because the Commission may waive its rules for good cause, *sua sponte* or pursuant to a waiver request, and it can grant motions for extension of time.³²⁷

84. In response to a complaint, VPDs and VPOs must file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry a VPD's or VPO's burden of proof. If the responding entity admits that it was not or is not in compliance with the Commission's rules, it shall file with the Commission sufficient records and documentation to explain the reasons for its noncompliance, show what remedial steps it has taken or will take, and show why such steps have been or will be sufficient to remediate the problem.

85. *Resolution of Complaints.* We decline at this time to specify a time frame within which the Commission must act on IP closed captioning complaints. While we recognize the importance of prompt actions on complaints, no such time frame exists for television closed captioning complaints, and we agree with commenters who explain that it would be difficult at this juncture to predict the length of time the Commission will need to resolve IP closed captioning complaints.³²⁸ In evaluating a complaint, the Commission will review all relevant information provided by the complainant and the subject VPDs or VPOs, as well as any additional information the Commission deems relevant from its files or public sources. When the Commission requests additional information, parties to which such requests are addressed must provide the requested information in the manner and within the time period the

³²² See *NPRM*, 26 FCC Rcd at 13757, ¶ 45.

³²³ See 47 C.F.R. § 79.1(g)(2), (4).

³²⁴ Consumer Groups Comments at 36-37.

³²⁵ AT&T Reply at 9 ("A 15 day response window would not allow sufficient time to examine the technical nature of complaints, ensure that they are addressed appropriately, and provide an informative response to the consumer. Moreover, a 30 day, rather than a 15 day, response time is consistent with many other Commission complaint procedures, including in the existing TV closed captioning rules.") (footnote omitted); NAB Reply at 33-34 (arguing that the 15-day proposal "appears likely to be unreasonable in any event due to the time that will be required for the VPPs/VPDs to discuss the matter with the complainant and relevant VPOs and to investigate the transmission path that the complainant relied upon to access the allegedly noncompliant video."); NCTA Reply at 9 ("The record contains no justification for shortening the response time or denying extensions, and more time rather than less may be needed in light of the complicated chain of entities that could be involved in determining why any particular program might appear online without captions.").

³²⁶ See *NPRM*, 26 FCC Rcd at 13757, 13771, ¶ 45 and App. A.

³²⁷ See 47 C.F.R. §§ 1.3, 1.46; see also 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."). Motions for extension of time, however, are not routinely granted, 47 C.F.R. § 1.46(a), and waivers are granted only for good cause, 47 C.F.R. § 1.3.

³²⁸ See, e.g., NCTA Comments at 22; NAB Reply at 34. But see Consumer Groups Comments at 37-38.

Commission specifies.

86. *Sanctions or Remedies.* We decline to create sanctions or remedies for IP closed captioning enforcement proceedings that deviate from the Commission's flexible, case-by-case approach governed by Section 1.80 of our rules.³²⁹ We do not find warranted the proposal of Consumer Groups that the Commission assess a new violation for each complaint, with a minimum forfeiture level of \$10,000 per violation.³³⁰ The record does not support either the \$10,000 minimum forfeiture level proposed by the Consumer Groups or establishing a base forfeiture level for IP closed captioning complaints at this time. Further, since closed captioning requirements for IP-delivered video programming are new, the Commission may benefit from conducting investigations before codifying a base forfeiture for addressing violations. As stated in the *NPRM*, we will adjudicate complaints on the merits and may employ the full range of sanctions and remedies available to the Commission under the Act.³³¹

87. *Content of Complaints.* Given the variety of issues that could cause IP closed captioning not to reach an end user (for example, a VPO's failure to provide captions, a VPD's failure to render or pass through captions, captions of an inadequate quality, a problem with the device used to view the captions, or the fact that captions were not required because the programming had not been shown on television with captions after the effective date of the new rules), we think it is important that we receive complaints containing as much information as possible that will enable their prompt and accurate resolution. Accordingly, complaints should include the following information:³³² (a) the name, postal address, and other contact information of the complainant, such as telephone number or e-mail address;³³³ (b) the name and postal address, website, or e-mail address of the VPD and/or VPO against which the complaint is alleged, and information sufficient to identify the video programming involved; (c) information sufficient to identify the software or device used to view the program; (d) a statement of facts sufficient to show that the VPD and/or VPO has violated or is violating the Commission's rules, and the date and time of the alleged violation;³³⁴ (e) the specific relief or satisfaction sought by the complainant; and (f) the complainant's preferred format or method of response to the complaint.³³⁵ Consumer Groups

³²⁹ See 47 C.F.R. § 1.80; see also Microsoft Reply at 7-8.

³³⁰ See Consumer Groups Comments at 36. See also ITI Reply at 8-9 (proposing that the Commission instead use its discretion in each case, within a range going no higher than \$10,000). Some commenters oppose the \$10,000 minimum forfeiture proposed by Consumer Groups. See AT&T Reply at 10; Microsoft Reply at 7-8; NAB Reply at 33; NCTA Reply at 10 (objecting to the adoption of a base forfeiture); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, Consumer Electronics Association, to Marlene H. Dortch, Secretary, FCC, at 3 (Nov. 14, 2011) ("CEA Nov. 14 *Ex Parte* Letter") (objecting to a minimum forfeiture but not a base forfeiture).

³³¹ See *NPRM*, 26 FCC Rcd at 13757, ¶ 45.

³³² While we proposed in the *NPRM* to require complaints to include this information, we recognize that some of the requested information may not be readily ascertained by consumers. For example, it may be difficult for consumers to determine the identity of the VPO, the postal address of the VPD or VPO, and the type of software or device the consumer used to view IP-delivered video programming. Accordingly, we provide that complaints *should* (but are not required to) include the specified information. The Commission will best be in a position to investigate complaints that include the maximum information requested.

³³³ We have enhanced this category of information from what was proposed in the *NPRM*, to facilitate contacting the complainant by means other than postal mail.

³³⁴ We have modified this requirement from what was proposed in the *NPRM*, in recognition of the finding that the date and time of the alleged violation should be included with all IP closed captioning complaints.

³³⁵ Some commenters agree that the Commission should impose comparable complaint requirements to those proposed in the *NPRM* and adopted herein. See, e.g., Consumer Groups Comments at 37-39; DIRECTV Comments at 15; CBS Reply at 19; NAB Reply at 35; NCTA Reply at 8.

also suggest that the Commission should permit consumers to submit photographic or video evidence of the captioning problem when filing a complaint.³³⁶ If a consumer wishes to submit such evidence, Commission staff will consider the evidence as part of the complaint proceeding. If a complaint is filed with the Commission, the Commission will forward complaints meeting the above-specified requirements to the appropriate party or parties. If a complaint does not contain all of the information specified in this paragraph and Commission staff determines that certain information is essential to resolving the complaint, Commission staff may work with the complainant to ascertain the necessary information and supplement the complaint. The Commission retains discretion not to investigate complaints that lack the above-specified information and complaints for which the Commission is unable to ascertain such information after further inquiries to the complainant.

88. *Written Complaints.* We conclude that complaints filed either with the Commission or with the VPD must be in writing. Consumer Groups propose that the Commission should permit the filing of complaints by “any reasonable means,” and it also proposes that the Commission accommodate evidence for closed captioning complaints submitted in American Sign Language.³³⁷ NAB disagrees, proposing instead that the means of filing complaints should mirror the television closed captioning rules.³³⁸ We find no reason to deviate from the requirement in the television closed captioning rules that a complaint must be in writing,³³⁹ and we thus adopt that proposed requirement, which has worked well in the television context. We clarify that, if a complainant calls the Commission for assistance in preparing a complaint (by calling either 1-888-CALL-FCC or 1-888-TELL-FCC (TTY)), and Commission staff documents the complaint in writing for the consumer, that constitutes a written complaint. A written complaint filed with the Commission must be transmitted to the Consumer and Governmental Affairs Bureau through the Commission’s online informal complaint filing system, U.S. Mail, overnight delivery, or facsimile. After the rules become effective, the Consumer and Governmental Affairs Bureau will release a consumer advisory with instructions on how to file complaints in various formats, including via the Commission’s website.

89. *Revisions to Form 2000C.* The Commission directs the Consumer and Governmental Affairs Bureau to revise the existing complaint form for disability access complaints (Form 2000C) in accordance with this *Report and Order*, to foster the filing of IP closed captioning complaints. In the *NPRM*, the Commission asked if it should revise the existing complaint form for disability access complaints (Form 2000C) to request information specific to complaints involving IP closed captioning,³⁴⁰ and industry and consumer groups support this proposal.³⁴¹ Should the complaint filing rules adopted in this *Report and Order* become effective before the revised Form 2000C is available to consumers, IP closed captioning complaints may be filed in the interim by fax, mail, or e-mail.

90. *Contact Information.* We will require VPDs to make contact information available to end users for the receipt and handling of written IP closed captioning complaints.³⁴² Given that we will permit consumers to file their IP closed captioning complaints directly with a VPD, we think it is important that consumers have the information necessary to contact the VPD. At this time, we decline to

³³⁶ See Consumer Groups Comments at 39.

³³⁷ See Consumer Groups Comments at 38-39.

³³⁸ See NAB Comments at 32; NAB Reply at 34-35.

³³⁹ See 47 C.F.R. § 79.1(g)(1).

³⁴⁰ See *NPRM*, 26 FCC Rcd at 13758, ¶ 46.

³⁴¹ See, e.g., Consumer Groups Comments at 38; NAB Comments at 32; CBS Reply at 19.

³⁴² See 47 C.F.R. § 79.1(i)(2) (requiring television video programming distributors to make contact information available for the receipt and handling of written closed captioning complaints).

specify how VPDs must provide contact information for the receipt and handling of written IP closed captioning complaints, but we expect that VPDs will prominently display their contact information in a way that it is accessible to all end users of their services. We agree with AT&T that “a general notice on the VPP’s/VPD’s website with contact information for making inquiries/complaints regarding closed captioning over IP video” would be sufficient,³⁴³ but we emphasize that such notice should be provided in a location that is conspicuous to viewers. We also agree with Consumer Groups that creating a database comparable to the television database of video programming distributor contact information may be infeasible in the IP context,³⁴⁴ given the potentially large number of VPDs that may emerge over time. Therefore, we decline at this time to create a database of IP video providers and their closed captioning contacts; if we find that VPDs are not providing their contact information in a sufficient manner, however, we may revisit this issue. Very few commenters provided their views on what contact information we should require.³⁴⁵ Accordingly, we will parallel the requirements for television video programming distributor contact information for the receipt and handling of written closed captioning complaints.³⁴⁶ Thus, we will require VPDs of IP-delivered video programming to make the following contact information accessible to end users: the name of a person with primary responsibility for IP closed captioning issues and who can ensure compliance with our rules; and that person’s title or office, telephone number, fax number, postal mailing address, and e-mail address. VPDs shall keep this information current and update it within 10 business days of any change.

91. We will not, however, require VPDs to make contact information available for the *immediate* receipt and handling of closed captioning concerns of consumers. The television closed captioning rules require video programming distributors to “make available contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program,”³⁴⁷ so that distributors can work with consumers to resolve the program at that time. We draw this distinction for these rules because we are concerned that websites and other sources of IP-delivered video programming may not be well-positioned to respond to a consumer’s immediate closed captioning concerns.³⁴⁸

IV. SECTION 203 OF THE CVAA

92. The CVAA amends Section 303(u) of the Act to “require that, if technically feasible, apparatus designed to receive or play back video programming transmitted simultaneously with sound . . . and us[ing] a picture screen of any size be equipped with built-in closed caption decoder circuitry or

³⁴³ See AT&T Comments at 15; see also DIRECTV Comments at 14-15; NAB Comments at 33 n. 75 (“It would be reasonable for the Commission to adapt the existing requirements for television station contacts, 47 C.F.R. § 79.1(i), to the online context. However, the Commission should refrain at this time from imposing any additional requirements.”).

³⁴⁴ See Consumer Groups Comments at 39; see also 47 C.F.R. § 79.1(i)(3) (requiring television video programming distributors to file contact information with the Commission).

³⁴⁵ See AT&T Comments at 15 (proposing that the Commission require “a general notice on the VPP’s/VPD’s website” and “an online form for submitting questions/complaints”); Consumer Groups Comments at 40 (proposing that the Commission require the provision of “all reasonable means of communication by which a user can file a complaint, including e-mail addresses, fax numbers, and postal mail addresses.”).

³⁴⁶ See 47 C.F.R. § 79.1(i)(2).

³⁴⁷ 47 C.F.R. § 79.1(i)(1).

³⁴⁸ See NCTA Comments at 22 n. 59 (“Websites and other online entities generally do not have customer service operations designed to handle inquiries about regulatory compliance from members of the general public.”).